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No. 87-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANNA PENK, *et al.*,
Petitioners,
v.
OREGON STATE BOARD OF HIGHER EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

The American Association of University Professors files this brief *amicus curiae* in support of the Petition for Writ of Certiorari with the consent of both parties.

INTEREST OF *AMICUS CURIAE*

The American Association of University Professors (hereafter "AAUP" or the "Association") is a national membership organization of 50,000 faculty members and research scholars in all the academic disciplines. Founded in 1915, it is the nation's oldest and largest organization dedicated to the advancement of higher education from the perspective of the faculty as a whole.

One of AAUP's central tasks is the development of statements intended to establish minimum standards of

institutional practice in higher education. Policy statements endorsed by AAUP address the protection of academic freedom and tenure, the role of the faculty in institutional governance, and the elimination of discrimination in academic life.[1] State and federal courts, including this Court, have frequently referred to AAUP policy statements in resolving disputes involving faculty members and their institutions.[2] The Association participates in litigation as *amicus curiae* on a selective basis; it makes here a rare appearance in support of a petition for writ of certiorari.

AAUP has long been concerned with the equitable compensation of faculty members and has addressed this concern both in study and in litigation. AAUP publishes an annual report on the economic status of the professoriate, compiling salary by rank and institution. The report is widely used in the academic community and has been cited by the courts as an authoritative source of information on faculty pay and related issues.[3] In 1977, AAUP published a comprehensive report recommending statistical methods for the comparison of the salaries of women and minority faculty members to those of white males in the institution.[4] Since about the same time, the annual economic report has contained data on

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[1] The major policy statements endorsed by AAUP are compiled in *AAUP Policy Documents and Reports* (1984), a copy of which is in the collection of the Supreme Court library.

[2] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-2 (1971); *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982); *Browzin v. Catholic University of America*, 527 F.2d 843 (D.C. Cir. 1975).

[3] *NLRB v. Yeshiva University*, 444 U.S. 672, 703 n.16 (1980) (Brennan, J., dissenting); *Sweeney v. Board of Trustees of Keene State College*, 14 FEP Cases 1220, 1227 (D.N.H. 1977), *aff'd*, 569 F.2d 169 (1st Cir.), *vacated and remanded on other grounds*, 439 U.S. 24 (1978) (per curiam), 604 F.2d 106 (1st Cir. 1979).

[4] Scott, *Higher Education Salary Evaluation Kit* (1977).

the comparative salaries of male and female faculty members which show a persistent discrepancy favoring males. The latest 1986-7 report reveals an actual increase in the disparity since 1977-8 in the ranks of assistant, associate and full professor.

As to litigation, AAUP intervened as a plaintiff in a landmark Title VII action that successfully eliminated the use of sex-based actuarial tables by a major pension plan covering more than 3,000 colleges and universities.[5] The Association participated as *amicus curiae* in the instant case in the Court of Appeals. It also participated as *amicus* in a case involving salary discrimination claims by faculty women at another institution of higher education in Oregon. *Hein v. Oregon College of Education*, 178 F.2d 910 (9th Cir. 1983).

By virtue of its extensive experience in matters of faculty evaluation and compensation and its commitment to equality of opportunity in higher education, the Association is well-situated to address this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This class action involves claims of faculty women at the eight institutions supervised by the Oregon State Board of Higher Education (hereafter "the Board") who allege discrimination based on sex in pay, rank, tenure, administrative appointments, and other conditions of employment. The District Court, after a trial, found merit in some of the individual claims but rejected the class claims.

As described more fully in the Petition for Writ of Certiorari, the faculty plaintiffs submitted statistical evidence establishing highly significant disparities between the salaries of male and female faculty members.

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[5] *Spirt v. TIAA-CREF*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded*, 463 U.S. 1223 (1983), 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984).

The Board introduced extensive statistical studies in rebuttal. These also showed disparities which, while less substantial, could not be explained by nondiscriminatory factors. The Board argued that plaintiffs' statistical analyses were defective for omitting variables relating to the quality of performance in teaching, scholarship, and service. It offered no evidence—statistical or otherwise—to show that these factors would actually explain the disparities. The trial court was nevertheless persuaded that these factors were determinative and concluded that both parties' statistical studies were inadequate for failing to incorporate them. The court determined that it was the faculty members' burden to account for these variables and that having failed to do so, they had not proved discrimination. The Circuit Court sustained the District Court's conclusion. 816 F.2d 458 (9th Cir. 1987).

Amicus submits that the lower courts erred profoundly in the requirements for statistical proof that they imposed on the plaintiffs. The Court of Appeals, in reaching its result, misread this Court's recent decision in *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), in such a way as to jeopardize the future implementation of equal opportunity in higher education. Moreover, amicus submits, in accepting the Board's speculation about the inferior performance of women as a class, the court seriously undermined the enforcement of Title VII. We devote our discussion here to the proper standards for establishing, and rebutting, claims of discrimination through statistical evidence, and the proper treatment under Title VII of an employer's claim that the explanation for sex-based disparities may be the inferiority of women as a class.

The Ninth Circuit's decision conflicts with *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), which held that statistical studies may serve to prove discrimination by a preponderance of the evidence without accounting for all measurable factors. Here the appellate court concluded

that variables which the Board raised as merely speculative explanations for the proven discrepancy were indispensable to the faculty members' statistical analysis. This is flatly contradictory with *Bazemore*, as it effectively elevates to the status of "major" factors that *must* be statistically analyzed certain conditions about which the Board only hypothesized. The Court of Appeals surely did not heed its own admonition that courts should not "decide legal propositions on hypothetical evidence." 816 F.2d 458, 465 n.1. Consequently, under the appellate court's approach, a Title VII plaintiff could rely on statistical proof only if the employer lacked the imagination to invent possible variables which the plaintiff might have examined.

The lower court's decision also departs from *Bazemore* in requiring that plaintiffs' statistical studies account for variables which could not be measured. In *Bazemore*, this Court refused to require that the statistical studies include even all *measurable* factors. In contrast, the Ninth Circuit decision requires that plaintiffs perform the impossible task of incorporating into their statistical studies factors that could not be measured because of the absence of data.

To the extent that *Bazemore* may not have expressly rejected the use of speculative explanations to rebut plaintiff's statistically established discrimination, the decision of the court below has created a conflict among the circuits. All three circuits which have considered this issue have uniformly prohibited the use of speculation by employers to rebut plaintiffs' statistical case. In light of the significance of this issue for the future enforcement of Title VII, the Court should grant review to resolve this conflict.

The lower court's decision fundamentally undermines Title VII in accepting the Board's speculative defense that sex-based disparities established by the plaintiffs' statistical studies may be explained by the inferior aca-

demic performance of women faculty as a class. Title VII was designed to eliminate this kind of sex-based stereotype. The lower court's approval of such a speculative explanation effectively stands the statute on its head.

Amicus AAUP urges the Court to grant review, in order to clarify that under *Bazemore*, unsubstantiated speculation about possible explanatory factors is entitled to no weight in rebutting the inference of discrimination raised by plaintiffs' prima facie statistical case, and that a plaintiff's statistical studies need not include variables that could not be measured. Review should also be granted to make clear that speculation about the inferior performance of women (or minorities) as a class is not an adequate defense in Title VII.

ARGUMENT

I. The Ninth Circuit's Decision Conflicts with *Bazemore v. Friday*.

The Circuit Court's decision conflicts with this Court's holding in *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), in two fundamental ways. First, it approves as valid rebuttal evidence defendant's speculative objections to missing factors in plaintiff's statistical studies despite an absence of evidence to demonstrate that the factors could reasonably account for the disparities based on sex. Second, the decision requires plaintiffs' studies to account not only for measurable factors but also for those that could not be measured. We discuss these flaws in the decision in sequence.

A. A Defendant's Unsubstantiated Speculation About Possible Explanatory Factors Cannot Rebut Plaintiff's Statistically Established Sex-Based Salary Inequities.

The Ninth Circuit adopted the District Court's determination that the plaintiffs' studies failed to include "such highly determinative quality and productivity fac-

tors" as the variables of quality of teaching, research, and service. 816 F.2d at 465. It cited no other grounds in the District Court's decision for rejecting the plaintiffs' proof. *Id.* Although the Board claimed that these were determinative factors in the decision-making process, it made no attempt to show, through statistical or any other studies, that these factors would in fact explain the statistical disparities.[6] Such a showing would have had to demonstrate that the performance of women, as a class, was inferior to that of men in the fundamental academic tasks of teaching, scholarship, and service. The lower courts nevertheless adopted the dubious conclusion that these factors "must have had a significant influence on salary and advancement decisions." 816 F.2d at 465.

In contrast, *Bazemore* held that it was error not to accept a multiple regression analysis as proof of discrimination by a preponderance of the evidence because it did not account for "all measurable variables thought to have an effect on salary level." 106 S.Ct. at 3009. While noting that the omission of variables might affect the probativeness of the analysis, this Court ruled that "a [statistical] analysis that included less than all measurable variables may serve to prove a plaintiff's case." *Id.*

The Court made clear that an employer is required to demonstrate the significance of the factors for which it criticizes plaintiffs for omitting. The District Court in *Bazemore* had determined that the plaintiffs' statistical evidence was to be sufficient for a *prima facie* showing

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[6] Indeed, as noted by the Circuit Court, the District Court found the Board's own statistical studies inadequate for this very omission. 816 F.2d at 464. The Board's only "evidence" was testimony that, in individual cases, such considerations were taken into account in setting salaries. As explained below in Section III, this type of testimony has little if any probative value with respect to class-wide differences in performance.

of discrimination.[7] However, it found, as did the District Court here, that the defendants had successfully rebutted plaintiffs' case by articulating "plausible reasons" for the disparity and satisfactorily explaining their validity. The "plausible" defense accepted by the trial court included testimony that nine nonracial factors existed that might explain the disparities, although no evidence was offered that inclusion of these factors would do so. *Bazemore v. Friday*, Civ. No. 2879, Slip Opin. at 133-134 (E.D.N.C. Aug. 20, 1982).

This Court made clear in *Bazemore* that the District Court erred in accepting such explanations when an employer simply declared that "many factors go into making up an individual employee's salary," without making any "attempt that we are aware of—statistical or otherwise—to demonstrate that when these factors were properly organized and accounted for, there was no significant disparity between the salaries of blacks and whites." 106 S.Ct. 3010 & n.14.

Bazemore is consistent with prior decisions of this Court holding that unsubstantiated speculation is entitled to no weight in rebutting a *prima facie* case of discrimination. In *Patton v. Mississippi*, 332 U.S. 463 (1947), the state attempted to rebut statistical evidence of underrepresentation of blacks on juries by suggesting that they lacked qualifications necessary for jury service. The Court responded that if this assumption could be proved, the defendant would have done so. In the absence of such demonstration, it found that the government's

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[7] The Circuit Court fundamentally misread the Court's holding on this matter. Noting that *Bazemore* reversed a lower court for finding certain statistical studies unacceptable as evidence of discrimination, the Ninth Circuit attempted to distinguish the instant case on the ground that the trial court here "admitted statistical multiple regression evidence at trial and then chose to discount the weight of that evidence." 816 F.2d at 464-65. It is plain, however, that *Bazemore* requires more than the mere admission of statistical studies as evidence in a trial.

speculation as to the lack of qualifications "wholly failed to meet" the statistical evidence produced by the plaintiff. 332 U.S. at 468.

Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), this Court held again that an employer was required to do more than merely hypothesize that certain factors might explain the statistical disparities. "If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made." 433 U.S. at 331.

Under the Ninth Circuit's interpretation here, mere speculation would serve to defeat plaintiffs' case. Permitting a employer to defeat a Title VII plaintiff's case by hypothesizing that omitted variables would explain the disparities poses a serious challenge to the effectiveness of *Bazemore*. It would become virtually impossible for a Title VII plaintiff to prove discrimination through the use of statistics because, as Judge Phillips observed in his dissent from the Fourth Circuit's opinion in *Bazemore*, "it will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated by any multiple regression analysis that could be conceived." 751 F.2d 662, at 692-93 (4th Cir. 1984). See also *Guardians Association v. Civil Service*, 630 F.2d 79, 88 n.7 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

In this case, the Board proffered no statistical or any other studies to show that performance in teaching, scholarship and service of women faculty, as a class, was inferior to that of their male colleagues.[8] Moreover,

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[8] The only evidence on the effect of performance on salary was anecdotal testimony by witnesses for the Board who stated that factors they considered in setting an *individual's* salary included teaching ability, research, and service. Other factors included market conditions, failure to negotiate harder, inflation, lack of money, budget, unpopular program, and personality. All of this testimony concerned salary decisions involving individuals and has

its own expert, Dr. Siskin, admitted that there was no evidence that factors relating to quality of performance would have an effect on pay disparities. In fact, the only relevant evidence presented on this issue more nearly suggests the opposite view. It revealed that women faculty, as a class, received percentage raises equal to men's during the period under the study, R.T. 22989, 22494-96, hence the quality of the women's performance, as a class, was probably viewed by their institutions as *equal* to that of male faculty members.

B. Plaintiffs Were Improperly Required to Account for Factors that Could Not Be Measured.

Bazemore holds that a plaintiff's statistical studies may prove discrimination even without including all *measurable* variables. By rejecting plaintiffs' studies for failing to account for factors of quality of teaching, service, and scholarship, the Ninth Circuit required that the faculty members' regression analyses include factors which not only cannot be easily measured in statistical terms but which in fact could not be measured in this case because the defendant failed to gather the necessary information. It is no accident that the Board made no attempt to show that factors representing quality of performance would in fact explain the disparities demonstrated by the faculty members' studies. The Board maintained no records from which the performance of individual faculty members could be reconstructed. Hence, to fault the faculty studies for failing to include these factors is to require them, contrary to *Bazemore*, to account for not only all "measurable variables," but also for some variables that could not in fact be measured.

The Ninth Circuit's approach in this case comports with its general requirement of plaintiffs' statistical proof. The standard, which the trial court followed, was

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little probative value regarding the question whether women as a class differed from men with respect to these factors.

set forth in *Spaulding v. University of Washington*, 740 F.2d 686, 704 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984). In that decision, the Circuit Court declared statistics to be deficient which "failed to control for exactly those differences between individuals that can legitimately lead to their being treated differently." *Id.* at 704. This standard is clearly far in excess of what was required by this Court in *Bazemore*, when it stated:

> A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence. 106 S.Ct. 3009.

See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In the instant case, the Court of Appeals elaborates on the standard set in *Spaulding* in rejecting as inadequate the standard of proof accepted in the social sciences. 816 F.2d at 465 n.1.

II. Review Should Be Granted to Resolve the Conflict in the Circuits Concerning the Weight of Speculative Explanations.

To the extent that *Bazemore* may not have explicitly rejected the use of speculation to rebut a plaintiff's statistically established case, the Ninth Circuit's decision now creates a conflict in the circuits. As noted above, the court accepted as rebuttal evidence the Board's speculative assertions that certain factors would explain the sex-based disparities established by the faculty plaintiffs' statistical analyses. See Section I. A. *supra*. This decision is squarely in conflict with the holdings of other circuit courts that have considered the issue whether a defendant may rebut a plaintiff's *prima facie* statistical case by speculative objections.

In the District of Columbia Circuit, unsupported speculation was first rejected as evidence to rebut a plaintiff's case in *Trout v. Lehman*, 702 F.2d 1094, 1102 (D.C. Cir. 1983), *rev'd on other grounds sub nom. Lehman v. Trout*, 465 U.S. 1056 (1984) and in *Segar v. Smith*, 738

F.2d 1249, 1287 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). In *Segar*, the appellate court found no evidence to support the government's claim of alleged differences in prior experience between blacks and whites, noting that there was no reason to assume there was such a difference. Moreover, it observed that since the government had not presented any admissible evidence that the purported differential in experience explained the observed disparities, the claim was "mere speculation and conjecture." *Id.* The court went on to observe that, although it was not necessary to rework a plaintiff's statistics, the most effective way to rebut a *prima facie* case was to present accurate statistics in support of the contradictory claim.[9] The employer was required, however, to make "some credible showing that the omission skewed plaintiffs' statistics." 738 F.2d 1287. The District of Columbia Circuit has recently reaffirmed this in *Palmer v. Shultz*, 812 F.2d 84, 99-101 (D.C. Cir. 1987), citing *Bazemore* as support for the rule.

The Second Circuit has adopted the same approach. In *Guardians Association v. Civil Service Commission*, 633 F.2d 232, 240 n.13 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), when the defendants objected to the adequacy of plaintiffs' statistics concerning the impact of the disputed tests, the court noted that *Dothard*, *supra*, required defendants to present evidence in support of their objections. In accepting plaintiffs' showing of bias in the tests, it commented: "Defendants were unwilling or unable to introduce persuasive evidence indicating otherwise. They introduced no statistics tending to show that even one of the examinations was in fact neutral in impact." *Id.* It thus rejected a rule that

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[9] It noted that, in this case where the plaintiff claimed the factor was too subjective to quantify, the defendant's claim that it was sufficiently objective for quantification was severely undermined by defendant's failure to incorporate the factor in its statistics. 738 F.2d at 1287.

would require a plaintiff to disprove defendant's unsupported objection to its statistics.

The same requirement that an employer provide evidence—and not merely speculation—to rebut a plaintiff's *prima facie* statistical case was adopted by the Fifth Circuit in *Falcon v. General Telephone*, 626 F.2d 369, 380-1 (5th Cir. 1980), *rev'd on other grounds*, 457 U.S. 147 (1982), and *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982). In *Payne*, the court noted the defendant's claim that the plaintiff's statistics had failed to take account of the fact that some black applicants may not have submitted to an interview. It nevertheless rejected that claim because "its major premise is wholly speculative." The only evidence concerning that point was a witness' testimony that he believed most applicants did appear for an interview. 673 F.2d 822. Similarly, the court rejected the defendant's claim that the figures were flawed because of duplicate applications from blacks, when there was no testimony or other evidence in support of such a hypothesis.

The rule adopted by these circuits [10] finds support in the well-settled principle that a litigant normally does not have the burden of establishing facts within the control of the opposing party. As this Court has observed: "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *U.S. v. N.Y.N.H.R.R.*, 355 U.S. 253, 265 n.5 (1957). This rule makes particularly good sense in Title VII cases where the employer not only has better access to

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[10] The Eighth Circuit refused to accept a defendant's unsubstantiated speculative objection in *Craik v. Minnesota State University Board*, 731 F.2d 465 (8th Cir. 1984). The court rejected defendant's objection to statistical studies that included administrators in the class of faculty, on the grounds that the defendant had failed to offer any evidence that correcting this overinclusion would have an impact on the disparities. *Id.* at 477 n.15.

the data but actually determines whether and to what extent relevant information is gathered. In the instant case, the Board was in a position to establish a systematic procedure for evaluating faculty performance and to collect and organize the data. It failed to do so. See Section I. B. above. Not to impose the burden of substantiating speculative objections on Title VII defendants would simply encourage employers not to maintain records.

III. Approval of Discriminatory Employment Practices on the Ground that Women Are Inferior As a Class in Effect Repeals Title VII.

The Circuit Court's conclusion that quality of teaching, research and service may account for salary disparities between women and men faculty constitutes a tacit assumption that women as a class are inferior to men regarding the fundamental indices of academic performance. Individual differences in ability and performance, of course, may legitimately account for differences in the pay of individuals. In an individual discrimination suit, performance criteria may indeed explain why the plaintiff has the lower salary. But the unsupported claim that women, as a group, are inferior to men in teaching, publication and service perpetuates gender stereotypes that Title VII clearly rejects.

A basic principle underlying equal employment laws is that absent discrimination, women and minorities will perform in the same manner as white males. As the Court explained in *International Brotherhood of Teamsters v. United States*, 421 U.S. 324 (1977), it is this assumption that permits an inference of discrimination from class-wide disparities which cannot be properly explained by factors unrelated to sex or race. *Id.* at n.20. Acceptance of an employer's speculation that class-wide inferiority in quality of performance explains disparities in salary or other terms of employment is wholly at odds

with the fundamental assumption of Title VII. This is not to say that there can never be differences in performance between groups. But if indeed women or minorities, as a class, are inferior in teaching, scholarship and service, it is surely incumbent on the employer who asserts such a claim in a Title VII suit to provide appropriate evidence in support of its argument rebutting a prima facie statistical case.[11]

CONCLUSION

The Court should grant the Petition for Writ of Certiorari in this case, to clarify the legal principles in Title VII cases that employers may not defeat a statistical *prima facie* case by mere unsubstantiated speculation that missing factors would explain the disparities, and the plaintiffs' statistical studies need not account for unmeasurable variables. Review should also be granted to make clear that unsubstantiated speculation about the inferiority of women or minority groups as a class is inadmissible as contrary to the fundamental principles of Title VII.

Respectfully submitted,

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[11] *See Melani v. Board of Regents*, 561 F. Supp. 769, 783 (S.D.N.Y. 1983), where the assumption that women interrupted their careers more often than men was allowed only if supported by statistical evidence.